

APPEAL NO. 041648
FILED AUGUST 12, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 7, 2004. The hearing officer determined that the appellant's (claimant) impairment rating (IR) is 5% [as certified by the independent medical evaluation (IME) doctor, Dr. W], and that the claimant is not entitled to supplemental income benefits (SIBs). The claimant appealed, arguing that the hearing officer's IR and SIBs determinations are against the great weight of the evidence. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part, reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant reached maximum medical improvement (MMI) on February 4, 2003. It is undisputed that the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) applies to this case. The pivotal issue in this case concerned the claimant's IR.

The designated doctor, Dr. M, examined the claimant on February 4, 2003, and Dr. M assigned the claimant a 19% IR, comprised of 5% under Diagnosis-Related Estimate (DRE) Lumbosacral Category II and 15% under DRE Thoracolumbar Category III. The carrier's peer review doctor, Dr. C, disagreed with Dr. M's report. At the CCH, Dr. C testified that the AMA Guides criteria listed under DRE Lumbosacral Category II and DRE Thoracolumbar Category III for a permanent impairment were not present at the time of the claimant's examination by Dr. M, thus the examination findings could not support a 19% IR. Dr. C opined that the claimant's IR is 5%, comprised of 0% under DRE Lumbosacral Category I and 5% under DRE Thoracolumbar Category II. On February 6, 2004, the IME doctor, Dr. W, examined the claimant and he assigned a 5% IR based on 0% under DRE Lumbosacral Category I, and 5% under DRE Thoracolumbar Category II. Dr. W commented in his report that a 5% IR would be the highest appropriate impairment from the AMA Guides, as the claimant had no objective signs of radiculopathy in either the thoracic or lumbar area.

On February 17, 2004, the Texas Workers' Compensation Commission (Commission) sent a letter to Dr. M requesting clarification regarding the claimant's IR and to specify what examinations findings indicated that the claimant would be placed under DRE Lumbosacral Category II and Thoracolumbar Category III. Dr. M responded that he assigned a 19% IR based on the MRI findings and diagnosis of the treating doctor, Dr. G, a chiropractor. Dr. M stated that the 19% IR was correct.

Section 408.125(c) provides that for a claim for workers' compensation benefits based on a compensable injury that occurs on or after June 17, 2001, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight. We further note that whenever a hearing officer rejects a designated doctor's report, the hearing officer should "clearly detail the evidence relevant to his or her consideration." Texas Workers' Compensation Commission Appeal No. 030091-s, decided March 5, 2003.

As the hearing officer noted, Dr. C raised some significant questions as to whether the designated doctor properly applied the AMA Guides in assigning his 19% IR to the claimant. Unfortunately, Dr. M's response to the Commission's request for clarification was insufficient to dispel those concerns. The hearing officer found that the designated doctor did not properly apply the AMA Guides, that the claimant's IR was not based upon the claimant's condition on the date of MMI, and the assignment of a 19% IR is against the great weight of the medical evidence. As a result, the hearing officer determined that the designated doctor's report was not entitled to presumptive weight and we cannot agree that the hearing officer erred in making that determination.

The Appeals Panel has held in limited cases that disputes regarding the designated doctor's assigned IR, that the hearing officer had an option of going back to the designated doctor a second (or third) time for clarification, or to adopt the IR of another doctor which was valid as provided for in Section 408.125, or to consider the appointment of a second designated doctor if it was determined that the designated doctor was unable or unwilling to comply with the AMA Guides. See Texas Workers' Compensation Commission Appeal No. 990907, decided June 14, 1999; Texas Workers' Compensation Commission Appeal No. 93932, decided November 29, 1993.

In the instant case, the hearing officer adopted Dr. W's assessment of the claimant's IR. The hearing officer found that Dr. W's certification of a 5% IR is consistent with the medical evidence, accurately reflects the claimant's condition on the date of MMI, and properly applies the AMA Guides. We disagree.

Dr. W assigned a 5% IR based on 0% under DRE Lumbosacral Category I and 5% under DRE Thoracolumbar Category II because he found that the claimant did not have objective signs of radiculopathy in the lumbar or thoracic spine. In addition, Dr. W noted that the claimant does not have lumbar symptoms and thus would deserve a 0% impairment in DRE Lumbosacral Category I. We note that the criteria for placement in DRE Lumbosacral Category I provides that the patient have no significant clinical findings, no muscle guarding or history of guarding, no documentable neurologic impairment, no significant loss of structural integrity on lateral flexion and extension roentgenograms, and no indication of impairment related to injury or illness.

In evidence were medical reports dated July 16 and August 1, 2002, from Dr. G, the treating doctor, in which he diagnosed lumbar and thoracic radiculitis and noted decrease in range of motion in all planes of the lumbar spine. The referral doctor's, Dr. P, medical reports dated August 1 and August 13, 2002, reflect that the claimant had radiculopathy at L1 and T12 based on MRI findings. Dr. P's operative report dated August 22, 2002, reflects that the claimant underwent epidural steroid injections at T12-L1. The claimant testified that the spinal surgery was recommended. The record reflects that the claimant had significant clinical findings and an indication of impairment in the lumbar spine related to the compensable injury. The evidence reflects that Dr. W's certification of a 5% IR is not consistent with the medical evidence and that he did not properly apply the AMA Guides.

In Texas Workers' Compensation Commission Appeal No. 022492, decided November 13, 2002, the Appeals Panel noted that a second designated doctor is rarely appropriate and should be limited to situations where, for example, the first designated doctor cannot or refuses to properly apply the AMA Guides, particularly after being asked for clarification or additional information concerning the report.

We find this case to be a rare situation where a second designated doctor should be appointed to determine the claimant's IR. Given that the evidence does not support the hearing officer's determination that Dr. W's certification of a 5% IR is consistent with the medical evidence and that he properly applied the AMA Guides, there are no other IR certifications by an examining doctor. Accordingly, a second designated doctor should be appointment to determine the claimant's IR, pursuant to Rule 130.1(c)(3).

We affirm the hearing officer's determination that the designated doctor's report is not entitled to presumptive weight.

We reverse the hearing officer's determination that the claimant's IR is 5%, as certified by the IME doctor and remand this case for the appointment of a second designated doctor to determine the claimant's IR, pursuant to Rule 130.1(c)(3).

With regard to the SIBs issue, Section 408.142(a)(1) provides that an employee is entitled to SIBs if on the expiration of the impairment income benefits period the employee "has an [IR] of 15 percent or more as determined by this subtitle for the compensable injury." Given that the IR issue has not been resolved, the SIBs determination cannot be determined at this time.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701-3403.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Margaret L. Turner
Appeals Judge